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Docket No. FIFRA 09-2009-0013

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**SECOND AMENDED MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S
RENEWED MOTION TO DISMISS U.S. EPA'S COMPLAINT**

Bug Bam Products, LLC (“Bug Bam”), by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby submits, pursuant to Rules 22.16(a) and 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.16(a), 22.20(a), the following Second Amended Memorandum of Law in Support of its Renewed Motion to Dismiss the First Amended Complaint filed in this matter by Region IX of the United States Environmental Protection Agency (“EPA” or “Complainant”) for the reasons discussed below.

I. INTRODUCTION

U.S. EPA Region IX lodged, on September 18, 2009, its Original Complaint against Bug Bam, claiming that Bug Bam violated Section 12(a)(1)(A) of Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) by selling/distributing pesticides not registered pursuant to Section 3 of FIFRA. Orig. Compl. at ¶14, 19, 24. On November 18, 2009, EPA filed a motion to amend the Original Complaint to add Flash Sales, Inc. as a respondent and to add additional allegations with respect to the FIFRA 25(b) minimum risk pesticide exemption. Amended Compl. at ¶2, 2-

20. The following day, EPA filed a supplemental motion to increase the proposed penalty sought. Suppl. Motion at 2. Bug Bam opposed both these motions and, on December 9, 2009 filed a Motion to Dismiss the proceeding because, as Bug Bam had never sold nor distributed the products in questions, Complainant had not established an action by Bug Bam upon which it could base its claims. EPA responded to Bug Bam's Motion to Dismiss, which Bug Bam timely replied to on December 28, 2009.

On January 7, 2010, EPA's requests to amend the Original Complaint were both granted. Bug Bam received the First Amended Complaint on February 3, 2010 and Bug Bam responded on February 23, 2010. Because the Amended Complaint rests upon elaborated allegations from its predecessor – namely that Bug Bam sold, distributed, or offered to sell the products – Complainant has not established that it is entitled to relief because Bug Bam never engaged in the alleged acts.

II. STATEMENT OF FACTS

Bug Bam is a Sole Member LLC incorporated in California and headquartered at 414 2nd Street, Suite 241, Hermosa Beach, California, 90254-4673. Joseph Symond is the President and inventor of Bug Bam Insect Repelling Wristband, Bug Bam for Kids Insect Repelling Wristband, and Bug Bam Insect Repelling Grid, all of which are mosquito repellants.

III. LEGAL STANDARD

Upon motion of the respondent, the Presiding Officer “may dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case” or, in the alternative, on “other grounds which show no right to relief on the part of the complainant.” 40 C.F.R. § 22.20(a). Thus, “[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [complainant] can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A complaint against an improperly named

defendant should be dismissed as to that defendant. *Winters v. U.S. Postal Service*, 721 F. Supp. 1388 (D.D.C. 1989) (dismissing the Postal Service as a named defendant from a tort action where the statute only permitted the United States to be the defendant); *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, (9th Cir. 1986) (affirming summary judgment for and dismissal of a complaint against an improperly named defendant where the defendant had no relation to the property).

IV. ARGUMENT

1. Bug Bam did not distribute, sell, or offer to sell products to Mr. Frank Carpenter.

In its Amended Complaint, EPA alleges that “Respondents jointly distribute or sell . . . ‘Bug Bam Insect Repelling Wristband,’ ‘Bug Bam for Kids Insect Repelling Wristband,’ and ‘Bug Bam Insect Repelling Grid.’” Amended Compl. at ¶5-6. Complainant, however, “can prove no set of facts . . . which would entitle [Complainant] to relief.” *Conley*, 355 U.S. at 45-46. Bug Bam never engaged in these sales or distributions. No facts in dispute exist with respect to this conclusion, as Complainant admitted in its Amended Complaint that “Flash Sales sent [the products] via mail to Mr. Carpenter.” Amended Compl. at ¶ 28, 35, 44.

Complainant also alleges that “the website bugbam.com offered for sale” the Bug Bam products. Amended Compl. at ¶26, 34, 42. The Environmental Appeals Board has recognized that “a published price list is not an offer to sell the goods listed at the published prices . . . but rather is an invitation to enter into negotiations or a mere suggestion to induce offers by others.” *In re TIFA Ltd.*, 9 E.A.D. 145 (2000) (quoting, in part, *Maurice Elect. Supply Co., Inc. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1087 (D.D.C. 1986)).

2. A Conclusionary Allegation Cannot be Used to Establish a *Prima Facie* Case

A court does “not accept as true conclusionary allegations in the complaint.” *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Justice Souter, writing for the majority in *Bell Atlantic v. Twombly*, instructs:

... a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1216, pp. 235–236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). 550 U.S. 544, 555 (2007).

It is further noted, per Rule 8(a) of the Federal Rules of Civil Procedure, that the elements of a complaint must contemplate "the statement of circumstances, occurrences, and events in support of the claim presented." *Bell Atlantic*, 550 U.S. at 556, fn. 3 (quoting 5 Wright & Miller §1202, at 94, 95). In contrast, Complainant has offered only a single conclusionary allegation: to paraphrase *Bell Atlantic*, *Id.* at 557, fn. 4, Complainant's allegation that Respondent made a sale or distribution in light of Complainant's admission that Flash Sales distributed the products is a "naked assertion . . . it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Cf. DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999).

Under FIFRA, terms like sale and distribution are "factually suggestive," *Bell Atlantic*, 550 U.S. at 557, fn. 5, and should be pled in conjunction with more specific allegations, such as invoicing, a sales receipt, and origin of the shipment. *Id.* at 557. In *Quality Foods v. Latin American Agribusiness Development Corporation*, plaintiff's lack of standing was upheld where the alleged antitrust violation concerned the frozen vegetable market; its complaint contained a conclusionary allegation that defendants also attempted to control the marketing of reconditioned auto parts exported to the United States; and no facts were alleged to support this claim. 711

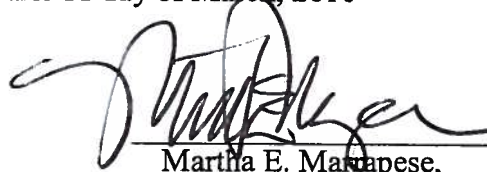
F.2d 989, 999 (11th Cir. 1983). Complainant has made a similar conclusionary allegation that Respondent has sold or distributed products, and no facts have been alleged to support this claim.

The Presiding Officer is not required to accept Complainant's use of suggestive terms or the *de facto* presence of a website as a sufficient basis to withstand a Motion to Dismiss. *Bell Atlantic*, 550 U.S. at 557. Otherwise, Complainant has virtually unfettered ability, irrespective of the safety of Respondent's products, to bring the full force of the Federal government down upon the Respondent for any number of minimal infractions, "with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 558 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)).

V. CONCLUSION

The appropriate remedy for a wrongly named party is to dismiss the complaint against it. *Winters*, 721 F. Supp. at 1388; *Kilkenny*, 800 F.2d at 853. For the reasons stated, Complainant's allegation of offer to sell and the addition of Flash Sales, Inc. as a respondent are insufficient to survive a Motion to Dismiss.

Dated this 11 day of March, 2010



Martha E. Marapese,
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Suite 500 West
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CERTIFICATE OF SERVICE

I, Martha E. Marrapese, hereby certify that on March 11, 2010, I sent the original of the foregoing Bug Bam Products, LLC's Renewed Motion to Dismiss and Second Amended Memorandum of Law in Support of its Renewed Motion to Dismiss via Federal Express to:

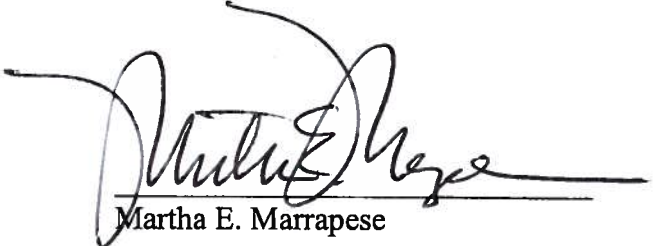
1. Mr. Steven Armsey
Acting Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street (ORC-1)
San Francisco, CA 94105

and one copy of the foregoing Motion via hand delivery to:

1. Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court, Suite 350
1099 14th St. NW
Washington, DC 20005

and one copy via Federal Express to:

3. Mr. Ivan Lieben
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105


Martha E. Marrapese

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:

**Bug Bam Products, LLC; and
Flash Sales, Inc.,**

Respondents.

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) **Docket No. FIFRA 09-2009-0013**
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ORDER GRANTING RESPONDENT'S RENEWED MOTION TO DISMISS

On March 11, 2010, Respondent Bug Bam Products, LLC's Renewed Motion to Dismiss U.S. EPA's Complaint, Docket No. FIFRA-09-2009-0013 ("the Motion") came before the Court.

On consideration of the pleadings and papers submitted in connection with the Motion, and good cause appearing therefore:

The Motion is hereby GRANTED. All claims against Bug Bam Products, LLC are accordingly dismissed with prejudice.

IT IS SO ORDERED.

Dated: _____, 2010

Honorable Barbara A. Gunning